## CONSTRUCTION MANAGEMENT AGREEMENT

This CONSTRUCTION MANAGEMENT AGREEMENT ("Agreement") is made and entered into as of the 13 day of June, 2006, by and between **HEADWATERS METROPOLITAN DISTRICT**, a quasi-municipal corporation and political subdivision of the State of Colorado ("District"), and **GRANBY REALTY HOLDINGS LLC**, a Colorado limited liability company("Manager").

#### RECITALS

WHEREAS, the District was organized pursuant to the laws of the State of Colorado in order to construct, operate and maintain certain public facilities and improvements for itself and Granby Ranch Metropolitan District ("Granby Ranch") in accordance with a Service Plan dated March 2003 (as amended or restated from time to time, the "Service Plan"); and

WHEREAS, pursuant to Section 32-1-1001(1)(d)(I), C.R.S., the District is permitted to enter into contracts and agreements affecting the affairs of the District; and

WHEREAS, the District desires to minimize the number of public employees which would be needed to provide the public facilities and improvements contemplated by the Service Plan and, as a result, expects to enter into various contracts for services related thereto; and

WHEREAS, the District desires to engage Manager to perform certain construction management services needed by the District to fulfill its obligations under the Service Plan, as more particularly described herein; and

WHEREAS, Manager has experience in providing the types of construction management services required by the District and is willing to provide such services to the District for reasonable consideration; and

WHEREAS, pursuant to Section 32-1-1001(1)(d)(II), C.R.S., the District has published a notice for bids for the services contemplated herein and has determined that Manager has submitted the lowest responsible and responsive bid; and

WHEREAS, the District and the Manager have previously entered into that certain Developer Construction/Reimbursement/Construction Management/and Operational Funding Agreement dated as of June 1, 2005 (the "2005 Construction Management Agreement") relating to, among other matters, construction management; and

WHEREAS, employees of Manager and its affiliates which serve on the board of directors of the District have advised the District that they have each disclosed potential conflicts of interest in connection with this Agreement as required by law; and

WHEREAS, the parties desire to enter into this Agreement to establish the terms by which Manager will provide certain services to the District;

NOW THEREFORE, in consideration of the mutual covenants and promises set forth herein, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

# I. APPOINTMENT OF MANAGER

- 1.1 <u>APPOINTMENT OF MANAGER</u>. The District hereby retains Manager and Manager agrees to perform certain management services for the District ("Management Services") pursuant to the terms and conditions set forth herein.
- 1.2 <u>INDEPENDENT CONTRACTOR STATUS</u>. Manager is and shall be considered an independent contractor under this Agreement. Nothing herein contained shall constitute or designate Manager or any of its employees or agents as employees or agents of the District, nor shall Manager be deemed or considered as a partner or agent of the District. Manager shall have full power and authority to select the means, manner and method of performing its duties under this Agreement without detailed control or direction of the District except as set forth in this Agreement. It shall be Manager's responsibility as an independent contractor to pay any and all taxes on payments which it receives under this Agreement and to pay its own costs and expenses incurred in connection with performance of this Agreement.

## II. DUTIES AND AUTHORITY

- 2.1 <u>GENERAL LIMITATIONS AND REQUIREMENTS</u>. Manager shall perform the duties and have the authority specified in Section 2.4 below. Manager shall have no right or authority, express or implied, to take any action, expend any sum, incur an obligation, or otherwise obligate the District in any manner whatsoever, except to the extent specifically provided in this Agreement or specifically authorized or ratified by the board of directors of the District as reflected in the minutes of the District's board meetings. Manager shall at all times conform to the stated policies established and approved by the District.
- 2.2 <u>COMPLIANCE WITH APPLICABLE LAW</u>. Manager shall provide the Management Services set forth herein in full compliance with all applicable laws, rules, and regulations of any federal, state, county, or municipal body or agency thereof having jurisdiction over the activities of the District.
- 2.3 <u>NO RIGHT OR INTEREST IN THE DISTRICT'S ASSETS</u>. Manager shall have no right or interest in any of the District's assets, nor any claim or lien with respect thereto, arising out of this Agreement or the performance of the Management Services contemplated herein.
- 2.4 <u>SPECIFIC DUTIES AND AUTHORITY</u>. Manager shall perform the following Management Services for the District:
- (A) Support Services for all activities related to construction projects to be completed by or under the direction of the District which are designated by the District to be performed by Manager (each, a "Project"). Such services shall include, but not be limited to, all

human resources, accounting and contract administration and support services relating to management of various Project construction contracts entered into by the District. Such personnel shall report to the District's representative. Manager may reject such appointment of any employee in its sole discretion. Manager shall provide to the District monthly reports of ongoing Projects, as described below.

- (B) Review and development of engineer's recommendations to the District for payment of contractors and suppliers.
- (C) Review of engineer's recommendations to the District and development of advice to the District regarding administration by the District of its contracts with engineers.
- (D) Performance of such other services as may be requested by the District by formal action reflected in the District's minutes, except that this Agreement shall not include any services for the management of completed facilities.
- 2.5 <u>GENERAL DUTIES AND AUTHORITY</u>. In connection with its specific duties, Manager agrees to:
- (A) Take all precautions necessary for safely and prudently conducting the Management Services required by this Agreement, including maintaining insurance as required by Part V hereof.
- (B) Advise the District of the status of the Management Services required by this Agreement on a regular basis and work in coordination with the District's consultants to assure that the District has the most complete information available for the exercise of the District's powers and discretionary authority.
- (C) Refrain from entering any contract, oral or written, in the name of the District, and from incurring any debt, liability or obligation for or on behalf of the District. All obligations incurred by Manager shall be obligations of Manager which shall hold the District harmless therefrom.

## III. COMPENSATION

- 3.1 <u>ANNUAL FEE ESTIMATES</u>. Fees to be paid to Manager for performance of the Management Services set forth herein shall be estimated on an annual basis, in advance, by the District during its annual budget process.
- 3.2 <u>FEE CALCULATION</u>. Annual fees to be paid to Manager shall be equal to one and a half percent (1.5%) of the actual project costs of construction of the Projects managed during 2006, or such lesser amount as may be indicated in writing by the Manager from time to time.
- 3.3 <u>ANNUAL BIDDING</u>. The District shall be entitled to bid each year's services under this Agreement as it deems necessary to comply with current law regarding contracts for such services. Manager shall have no claim against the District if this Agreement is not extended for any

budget year.

- 3.4 <u>MONTHLY REPORTS AND PAYMENTS</u>. Manager shall submit to the District monthly management reports in a form acceptable to the District which summarizes each Project under construction, describe the completed work on each Project, describe the work yet to be performed to complete each Project, summarize the Project Costs expended by the District to date on each Project, and summarize the fee due to Manager for Project Costs paid by the District. Manager shall submit its reports together with its invoice for services to the District each month. Invoices shall be submitted and paid no more frequently than once a month.
- 3.5 <u>EXPENSES</u>. Manager shall be responsible for all expenses it incurs in performance of this Agreement and shall not be entitled to any reimbursement or compensation except as set forth in Sections 3.1 and 3.2 hereof unless such expenses are approved for reimbursement in advance by the District in writing. Manager shall not charge the District any other fee for use by the District of Manager's offices, personnel, or overhead except as agreed in advance by the District in writing.
- 3.6 <u>FEE ADJUSTMENT</u>. The District and Manager shall annually analyze the reasonableness of the fee set forth above and may, upon the mutual consent of the District and Manager, adjust the schedule and fees as they deem appropriate. The failure of the District and Manager to agree upon any such adjustment shall not require a termination of this Agreement nor shall either party be entitled to seek an adjustment from any court or other tribunal.

## IV. DURATION AND TERMINATION

- 4.1 <u>TERM</u>. The term of this Agreement shall begin on the date set forth above, shall be effective as of such date regardless of the date of execution hereof, and shall expire on the 31st day of December of such year unless extended by the parties by written extension agreement for successive annual periods, or unless sooner terminated in accordance with the termination provisions set forth below.
- 4.2 <u>TERMINATION</u>. Either party may terminate this Agreement prior to its annual expiration date for convenience or for cause, in whole or in part, by delivery to the other party of a written notice of termination at least thirty (30) days prior to the effective date of termination. Such notice shall specify the extent of termination and the effective date, but shall not be required for automatic expiration under Section 4.1 hereof.

The parties hereto acknowledge that the District anticipates that any amounts owed hereunder will be from bond proceeds made available to the District by Granby Ranch (or other metropolitan districts formed for the purpose of funding the public infrastructure contemplated by the Service Plan) and, to the extent such bond proceeds are not available, from advances made to the District by Granby Realty Holdings LLC for such purpose. In the event that the District determines that it will not have sufficient funds available to it to continue to pay amounts owed hereunder, the District expects that it will terminate this Agreement in accordance with the terms hereof.

In the event of early termination, the District shall pay Manager for all the Management Services satisfactorily performed prior to the designated termination date based upon the compensation formula provided above giving due account for Project Costs for which the District has become responsible through the date of termination. The parties shall attempt to select termination dates which coincide with payments made to contractors for Project Costs.

Upon any termination, Manager shall transfer title and deliver to the District all work product which shall be deemed from and after the effective date of this Agreement to be the property of the District. "Work Product" shall consist of all written materials maintained by Manager in connection with performance of this Agreement, including but not limited to all maps, plans, drawings, specifications, reports, electronic files and other documents, in whatever form. Manager shall maintain reproducible drawings of any Project drawings which it obtains and shall make them available for the District's use, and shall provide such copies to the District upon request at commercial printing rates. Manager shall be entitled to retain copies of all work product at its own expense.

#### V. INSURANCE

- 5.1 <u>INSURANCE COVERAGE REQUIREMENTS</u>. Manager shall acquire and maintain during the term of this Agreement, including any extensions of the term, statutory workers' compensation insurance and comprehensive general liability insurance in the following minimum amounts:
  - (A) Workers' Compensation insurance as required by law.
- (B) Comprehensive general liability insurance, \$1,000,000, combined single limit for bodily injury and property damage, each occurrence; \$1,000,000 general aggregate; and \$1,000,000, products and completed operations aggregate.

Manager shall provide to the District at the beginning of each annual term of this Agreement certificates of insurance demonstrating appropriate coverage in the amounts designated above.

5.2 <u>Fidelity Bond</u>. Manager shall secure and maintain, at its own expense, a fidelity bond in favor of the District covering Manager and its employees and agents who may provide or be responsible for the provision of services hereunder where such activities contemplate the responsibility for money or property of the District. Such bond shall protect the District against any fraudulent or dishonest act which may result in the loss of money, securities, or other property belonging to or in the possession of the District. Said bond shall be in an amount not less \$5,000.00 and be obtained from a surety satisfactory to the District.

## VI. MISCELLANEOUS

- 6.1 <u>LIABILITY OF THE DISTRICT</u>. No provision, covenant or agreement contained in this Agreement, nor any obligations herein imposed upon the District shall constitute or create an indebtedness or debt of the District within the meaning of any Colorado constitutional provision or statutory limitation.
  - 6.2 <u>ASSIGNMENT</u>. Except as set forth herein, neither this Agreement, nor any of the

parties' rights, obligations, duties or authority hereunder may be assigned in whole or in part by either party without the prior written consent of the other party which consent shall not be reasonably withheld. Any improper attempt of assignment shall be deemed void and of no force or effect. Consent to one assignment shall not be deemed to be consent to any subsequent assignment nor the waiver of any right to consent to such subsequent assignment.

- 6.3 <u>MODIFICATION</u>. This Agreement may be modified, amended or changed, except as otherwise provided herein, in whole or in part, only by an agreement in writing duly authorized and executed by both parties.
- 6.4 <u>INTEGRATION</u>. This Agreement contains the entire agreement between the parties, and no statement, promise or inducement made by either party or the agent of either party that is not contained in this Agreement shall be valid or binding.
- 6.5 <u>SEVERABILITY</u>. Invalidation of any of the provisions of this Agreement or of any paragraph, sentence, clause, phrase, or word herein, or the application thereof in any given circumstance, shall not affect the validity of any other provision of this Agreement.
- 6.6 <u>SURVIVAL OF OBLIGATIONS</u>. Unfulfilled obligations of both parties arising under this Agreement shall be deemed to survive the expiration or termination by court order or otherwise of this Agreement, and shall be binding upon and inure to the benefit of parties and their respective successors and permitted assigns.
- 6.7 <u>GOVERNING LAW</u>. This Agreement shall be governed and construed in accordance with the laws of the State of Colorado.
- 6.8 <u>HEADINGS FOR CONVENIENCE ONLY</u>. The headings, captions and titles contained herein are intended for convenience and reference only and are not intended to construe the provisions hereof.
- 6.9 <u>PERSONS INTERESTED HEREIN</u>. Nothing expressed or implied in this Agreement is intended or shall be construed to confer upon or to give to any person, other than parties hereto, any right, remedy, or claim under or by reason of this Agreement or any covenants, terms, conditions, or provisions thereof, and all of the covenants, terms, conditions, and provisions in this Agreement by and on behalf of the parties shall be for the sole and exclusive benefit of the parties hereto.
- 6.10 <u>NOTICES</u>. Except as otherwise provided herein, all notices or payments required to be given under this Agreement shall be in writing and shall be hand delivered or sent by certified mail, return receipt requested, or air freight, to the following addresses:

Headwaters Metropolitan District

Gary R. White, Esq. White, Bear & Ankele Professional Corporation

1805 Shea Center Drive, Suite 100 Highlands Ranch, Colorado 80129

Manager's Address for Mailing and Hand Delivery:

Gerry Engle Granby Realty Holdings, L.L.C. 999 Village Road Post Office Box 1110 Granby, Colorado 80446

All notices or documents delivered or required to be delivered under the provisions of this Agreement shall be deemed received one (1) day after hand delivery or three (3) days after mailing. Either party by written notice so provided may change the address to which future notices shall be sent.

- 6.11 <u>RECOVERY OF COSTS</u>. In the event of any litigation between the parties hereto concerning the subject matter hereof, the prevailing party in such litigation shall be entitled to receive from the losing party, in addition to the amount of any judgment or other award entered therein, all reasonable costs, expenses and attorney's fees incurred by the prevailing party in such litigation.
- 6.12 <u>INSTRUMENTS OF FURTHER ASSURANCE</u>. The parties hereto each covenant that they will do, execute, acknowledge, and deliver or cause to be done, executed, acknowledged, and delivered, such acts, instruments, and transfers as may reasonably be required for the performance of their obligations hereunder.
- 6.13 <u>COMPLIANCE WITH LAW</u>. This Agreement is intended to be performed in accordance with and only to the extent permitted by all applicable laws, ordinances, rules, and regulations of the jurisdiction in which the Agreement is performed. Manager declares that Manager has complied with all federal, state and local laws regarding business permits, certificates and licenses that may be required to carry out the services to be provided under this Agreement.
- 6.14 <u>SUBJECT TO ANNUAL BUDGET AND APPROPRIATION</u>. The District does not intend hereby to create a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever. The performance of those obligations of the District hereunder requiring budgeting and appropriation of funds are subject to annual budgeting and appropriations.
- 6.15 <u>NON-WAIVER</u>. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other provision of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default hereunder be deemed to be a waiver of any subsequent default hereunder.
  - 6.16 CAPTIONS AND HEADINGS. The headings throughout this Agreement are for

constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default hereunder be deemed to be a waiver of any subsequent default hereunder.

- 6.16 <u>CAPTIONS AND HEADINGS</u>. The headings throughout this Agreement are for convenience and reference only, and shall in no way be deemed to define, limit, or add to the meaning of any provision of this Agreement.
- 6.17 <u>BINDING AGREEMENT</u>. This Agreement shall inure to and be binding on the heirs, executors, administrator, successors, and permuted assigns of the parties hereto.
- 6.18 <u>EFFECT ON 2005 CONSTRUCTION MANAGEMENT AGREEMENT.</u> This Agreement shall supersede the 2005 Construction Management Agreement shall be of no further force and effect, but solely to the extent relating to construction management.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

Manager:

GRANBY REALTY HOLDINGS LLC

The District:

HEADWATERS METROPOLITAN DISTRICT

ATTEST:

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